

FILED
MAR 31 2008
C

1 KENNETH DONALD McCURDY IN PRO-PER
2 C-76230 ED-184-I
3 P.O.Box 689
Soledad, Ca.
93960-0689

RECEIVED
MARCH 31 2008
NORTHERN DISTRICT COURT
CALIFORNIA

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

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12

13 KENNETH DONALD McCURDY

CV07-05084 CW

14

Petitioner

TRAVERSE TO MOTION

15

v.

TO DISMISS

16

BEN CURRY, WARDEN , et al.,

Judge: The Honorable

17

Respondent

Claudia Wilken

18

19

20 The Petitioner Kenneth McCurdy, IN PRO-PER,
21 Petitions this honorable court to issue and maintain
22 the Writ previously filed by the petitioner in this
23 court, The Deputy Attorney General
24 STACEY D. SCHESSER, State Bar # 245735
455 Golden Gate Avenue, Suite 11000
San Francisco, Ca.
94102-7004

25
26 Has ask this court to take notice and dismiss under the
27 Governing Rules of Court pursuant to 28,U.S.C.§ 2254 and
28 Rule 4 of the Rules Governing § 2254:

1 The motion to dismiss was based on the failure of the
2 Petitioner's Writ to properly exhaust all state remedies
3 at the "Highest State Court'California Supreme
4 Court, And further states and cites the following case
5 law.....The Antiterrorism and Effective

6 Death Penalty Act of 1996 (AEDPA)

7 28 U.S.C. § 2254(b)(1)(A): O'Sullivan

8 v. Boerchel, 526 U.S. 838,844 (1999)

9 Jonson v. Zenon, 88F.3d 828,829 (9th

10 Cir.1996)

11 Peterson v. Lampert 319 F.3d 1153,1156

12 (9th Cir. 2003)

13 Larche v. Simons, 53 F.3d 1068,1071

14 (9th Cir. 1995)

15

16 In alleging that petitioner failed to allow the California
17 Supreme Court the ample opportunities to dismiss the
18 claims placed before the court that has been brought
19 forth in this honorable court, petitioner contends that
20 he has placed before the "Highest State Court all the
21 issues that is in this current writ for relief.

22 As to the claim that petitioner did not address the issue
23 of **THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY**

24 **ACT OF 1996 (AEDPA).**

25 The petitioner did not address this issue as it is a
26 **EX POST FACTO** law and therefore does not pertain to the
27 current issues before this court at this time.

28 Petitioner contends that the Deputy Attorney General

1 has in fact misread the petitioner's writ of relief
2 that was placed before the California Supreme Court
3 and citing cases that is only a facade to cover the
4 smoke and mirrors to confuse the issue as the petitioner
5 has addressed all the current issues that are before this
6 Honorable Court. Petitioner further contends that he has
7 met all rules of court and that in fact this writ of
8 relief was placed before the Court in this same context
9 and that only the Face Sheet was changed to conform to
10 Federal Court Rules.

11 All documents that are now before this court has been
12 ruled on by all the State Courts, from the Superior Court
13 in Kern County to California Supreme Court.....

14 MEMORANDUM OF POINTS AND AUTHORITIES

15 IN SUPPORT OF TRAVERSE:

16 PETITIONER HAS A PROTECTED LIBERTY INTEREST IN PAROLE UNDER
17 THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE
18 CONSTITUTION

19 A. Petitioner has a Liberty Interest in parole under
20 the Due Process Clause of the United States
21 Constitution.

22 B. Petitioner has a Liberty Interest in parole under
23 the Due Process Clause of California Constitution.

24 TABLE OF AUTHORITIES:

25 Cases:

26 Auto Equity Sales, Inc. v. Superior Court (1962).....
27 57 Cal.2d 450, 455 states in fact; Accordingly, petitioner
28 possesses a due process liberty interest in parole under

the California States Constitutions.....

2 The Due Process Clause of the **FOURTEENTH AMENDMENT**

3 prohibits state action that deprives a person of Life,

4 Liberty, or property without due process of law.

5 (U.S. Const.,14th Amend.)

6 A person alleging a due violation must first demonstrate

7 that he or she was deprived of a liberty interest or

8 property interest protected by the Due Process Clause and

9 then show that the procedures attendant upon the deprivation

10 were not constitutionally sufficient.

11 The Board's continued reliance on factors that petitioner

12 cannot change in denying him a finding of Parole Suitability

13 violated petitioner's state statutory rights, and state and

14 federal constitutional rights of process.

15 (The) Board's decision was not based on "Some

16 Evidence" and did not reflect an individualized

17 consideration of the record. The Board's decision

18 must not stand, because by repeatedly relying on

19 **immutable factors** and undisputed evidence in the

20 record with its own unsubstantiated conjecture,

21 the Board has converted petitioner's sentence of

22 life with the possibility of parole into a de facto

23 sentence of life without the possibility of parole.

24 there is no support in the record for the Board's

25 finding that Petitioner **currently** presents an

26 **unreasonable** risk of danger to society, and in fact

27 disregarded the professional Statement made by the

28 CDC's Correctional Pyschologist, **M.Macomber, Ph.D.**

"The prognosis for successful adjustment in the community is excellent."

The report was counter signed by Dr. B.Zika, Ph.D.

Senior Psychologist.

That report was wrote by Dr. Macomber, Ph.D. after an extensive interview with the petitioner on 7/22/06 and was typed for legal record on 7/25/06.

Therby creating a violation of the petitioner's Due Process, as outlined under the 14th Amendment of the Constitution.

Futher Board's lack of finding the petitioner unsuitabile for parole violated the petitioner's liberty interest as cited in the following case law.

Biggs v. Terhune, (9th Cir. 2003) 334 f.3d 910,

Board of Pardons v. Allen (1987) 482 U.S. 369

Early v. Packer (2002) 537 U.S. 3.....

In re Dannenberg (2005) 34 Cal.4th 1061.

In re SCOTT (2005) 133 Cal.App.4th 871.

Sass v. Board of Prison terms (N.D.Cal.2005) 376 Supp.2d 97

Sass v. California Bd. Prison Terms (9th Cir. 2006) 461 F.3d 112

Irons v. Warden of California State Prison-SOLANO

(E.D.Cal.2005)358F.Supp.2d 936.....

McQuilllion v. Duncan (9th Cir.2002) 306 F.3d 895.....

In re Deluna (2005) 126 Cal.App.4th 485.

In re Rosenkrantz (2002) 29 Cal.4th 616.....

Rosenkrantz v. Marshall (C.D. Cal.2006) 444 F.Supp.2d.106

Terhune v. Superior Court (1998) 65 Cal.App.4th 864.....

Williams v. Taylor (2000) 529 U.S. 362.....

Statutes and Regulations:

28 U.S.C. §2254

Cal. Code Reg. Title 15, §2402

Cal.Code Reg. Title 15 §§ 2401

Cal. Const., art. 1, § 15

Cal. Const. art. 1 § 7

U.S. Const., 5th Amend.

U.S. Const. 14th Amend.

10 In conclusion of all the above and before stated rules,
11 regulations, the petitioner further states that he fills
12 that this court is the only avenue he has left to obtain
13 justice and that as a layman to the law that the honorable
14 court take into consideration that the petitioner be not
15 held to the strict standards that the Honorable Court holds
16 Attorney's of the Board.

17 And to further clarify the issue the Deputy Attorney
18 General put forth as to the failure to address the AEDPA
19 Under AEDPA, Federal courts cannot issue a writ of habeas
20 corpus unless the state court's adjudication of the claim
21 was "contrary to, or involved an unreasonable application of
22 clearly established Federal law, as determined by the Supreme
23 Court of the United States.

24 Under Sass 2 the Ninth Circuit stated, "Under AEDPA it is
25 not our function to speculate of parole hearings or how
26 they could proceed, however the court did find that,
27 "Under AEDPA standard of review that California's parole
28 statutes use mandatory language and, by doing so, create

1 a liberty interest in parole.

2 THE BOARD'S DENIAL OF PAROLE SUITABILITY
3 VIOLATED THE "SOME EVIDENCE" STANDARD AND
4 PETITIONER'S CONSTITUTIONAL RIGHTS OF DUE
5 PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

6 **A. THE "SOME EVIDENCE" Standard in Parole Suitability:**

7 As demonstrated, California's parole scheme creates a
8 cognizable liberty interest in release on parole. This
9 interest is protected by the procedural safeguards of the
10 Due Process Clause of the United States Constitution.

11 (U.S. Const., 5th & 14th Amend.: *Biggs v. Terhune*, *supra*, 334
12 F3d. at pp. 914-915... Generally, federal due process is
13 satisfied only at the Federal Court level.

14 The Boards decision in the present case violated both
15 federal and state due process.

16 [B]efore an inmate may receive a parole date, the Board
17 must find the inmate suitable for parole. (Pen. Code, §3041
18 Cal. Code Regs. Title 15, §§ 2401, 2402.) As with the parole
19 hearing generally the Board's parole finding must comply
20 with constitutional due process.

21 In the present case the Board failed to satisfy the
22 criteria for "some Evidence" therefore this court has
23 jurisdiction to compel the States Attorney General to
24 comply to a Show Cause Order why the petitioner should
25 be held in custody when he has complied with the rules
26 and has shown no compelling reason that he is a current
27 threat to society. But further has had a outstanding
28 parole plan put forth by his son.

As outlined in the support letters that have been and are

1 on file and part of the record of this writ.

2 In reviewing a Board's decision that an inmate is
3 unsuitable for parole,"the judicial branch is authorized
4 to review the factual basis of a decision of the Board
5 denying parole in order to ensure that the decision comports
6 with the requirements of due process of law." (In Re
7 Rosenkrantz, *supra* 29 Cal.4th at p.658.

8 Courts also must ensure that the evidence relied on by the
9 Board in meeting the"some evidence" standard is both
10 reliable and of a solid value. (*Id.*,at pp.665:see Cal.Code
11 Regs.,Title 15 §§ 2402 subd.(b): see also *In re Scott*
12 (2005) 133 Cal.App.4th 573,591.)

13 It is not sufficient for the Board to derive findings from
14 a silent or misconstrued record or influenced by letters
15 introduced by the County District Attorney whereby his
16 oppion was read into the record and used as a basis for
17 the denial, The statement made was not a matter of legal
18 court proceedings of the original plea bargain, thereby
19 the District Attorney enhanced and biased the Board members
20 by making the statement that"He felt that this crime was
21 an execution style murder, and was used as is clearly
22 read in the exhibit of California Parole Hearings of
23 08-16-07, at line 18 of page 77 .

24 This is not new materialbeing introduced by the petitioner
25 but rather a matter of record introduced by the Parole
26 Board and was originally introduced by the petitioner
27 as a exhibit with this writ.

28 Based upon these facts the petitioner pleads with this

1 court to hold forth and issue an order compelling the
2 attorney general to show cause why this petitioner
3 should be refrained from his freedom any longer, and
4 further hold that this writ proceeding is legally
5 under the rule and findings of this court.

6 And that the petitioner has complied to the best of his
7 ability as a layman of the law. And that this show
8 cause order issued by this same court holding that
9 petitioner has shown "good cause appearing."

10 **CONCLUSION**

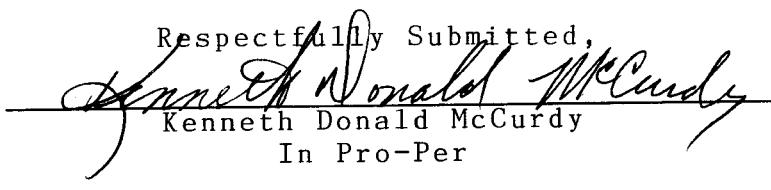
11 For the foregoing reasons, petitioner humbly requests
12 that this court:

- 13 1. Declare that the Deputy Attorney General's request
14 for a motion to dismiss be denied.
- 15 2. Declare that the Board's decision denying petitioner
16 parole suitability was capricious, arbitrary, and
17 failed to meet the "**some evidence**' standard.
- 18 3. Issue forthwith an order that petitioner be released
19 from custody.
- 20 4. Grant petitioner such other and further relief as
21 may be deemed appropriate in the interest of
22 justice, including discovery by petitioner and an
23 evidentiary hearing on these issues.

24

25 Dated; March 27, 2008

26 Respectfully Submitted,

27 
Kenneth Donald McCurdy

28 In Pro-Per

**PROOF OF SERVICE BY MAIL
BY PERSON IN STATE CUSTODY
(C.C.P. SS 1013(A), 2015,5)**

I, Kenneth D. McCurdy, declare:

I am over 18 years of age and I am party to this action. I am a resident of CORRECTIONAL TRAINING FACILITY prison, in the County of Monterrey, State of California. My prison address is:

Kenneth D. McCurdy, CDCR #: C-76230
CORRECTIONAL TRAINING FACILITY
P.O. BOX 689, CELL #: ED-184-L
SOLEDAD, CA 93960-0689.

On March 27, 2008, I served the attached:

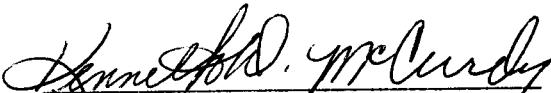
Traverse to CV07-05084 CW

on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope (verified by prison staff), with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named institution in which I am presently confined. The envelope was addressed as follows:

OFFICE OF THE CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
1301 CLAY ST. SUITE 400S
OAKLAND CALIFORNIA
94612-5212

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 27, 2008.


Kenneth D. McCurdy
Declarant